No. 76-785

Supreme Court, U. S.
FILED
FEB 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

DANIEL WALKER, Governor of the State of Illinois, DONALD PAGE MOORE, Director, Office of Special Investigations, State of Illinois, and LAURI STAPLES,

Petitioners,

vs.

SAMUEL COLAIZZI, SAMUEL INDOVINA, THEODORE MAROS, RAMON SCULLY, and ZENITH ASSOCIATES, INC., an Illinois Corporation,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WAYNE B. GIAMPIETRO
PHILLIP E. FREED
Attorneys for Respondents Samuel Colaizzi and Samuel Indovina

WAYNE B. GIAMPIETRO
134 N. LaSalle Street
Chicago, Illinois 60602

PHILLIP E. FREED
188 W. Randolph Street
Chicago, Illinois 60601

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
QUESTION PRESENTED	2
APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT:	
I. The Decision Below Is In Conflict With No Decision Of This Court	4
II. Petitioners Cannot Contend That Plaintiffs Were Given A Due Process Hearing	7
III. This Case Raises No Novel Questions Under Either The First Or Fourteenth Amendments	8
CONCLUSION	11

LIST OF AUTHORITIES CITED

Barr v. Matteo, 360 U.S. 564 (1959)	4
Bishop v. Wood, ... U.S. ....., 96 S.Ct. 2074 (1976)	6
Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972)	5, 6
Ex Parte Young, 109 U.S. 123, 28 S.Ct. 441	8
Monroe v. Pape, 365 U.S. 167 (1961)	4
Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976)	4, 5
Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683 (1974)	8, 9
Wisconsin v. Constantineau, 400 U.S. 433 (1971)	4, 5
Illinois Constitution, Article VIII, §4	10
Chapter 48, Illinois Revised Statutes, §640	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

DANIEL WALKER, Governor of the State of Illinois, DONALD PAGE MOORE, Director, Office of Special Investigations, State of Illinois, and LAURI STAPLES,

Petitioners,

VS.

SAMUEL COLAIZZI, SAMUEL INDOVINA, THEODORE MAROS, RAMON SCULLY, and ZENITH ASSOCIATES, INC., an Illinois Corporation,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Justices of the Supreme Court of the United States:

The Respondents, Samuel Colaizzi and Samuel Indovina, respectfully pray that the Petition for Writ of Certiorari filed herein be denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported officially at 542 F.2d 969 (1976), and is reproduced as Appendix 1 to the Petition for Writ of Certiorari. The opinion of the District Court is not reported and is reproduced as Appendix 2 to the Petition for Writ of Certiorari.

QUESTION PRESENTED

Petitioners have briefed one main question in their Petition for Writ of Certiorari:

Whether a State Governor has the right to make comments accusing untenured public employees of a crime to the public at large in connection with their discharge, without granting them a hearing prior to making such statements.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the Constitutional Provisions and Statutes referred to in the Petition for Writ of Certiorari, the following are pertinent:

The Illinois Constitution of 1970, Article VIII, §4:

> "Except as the General Assembly may provide by law, sovereign immunity in this State is abolished."

Chapter 48, Illinois Revised Statutes, §640:

> "Except as is hereinafter provided in this Section, information obtained from any individual or employing unit pursuant to the administration of this Act [Unemployment Compensation Act] shall be confidential and shall not be published or be open to public inspection, nor be used in any court in any action or proceeding pending therein, nor be admissible in evidence in any action or proceeding other than one arising out of the provisions of this Act . . . Any officer or employee of the State who, except with authority of the Director pursuant to this Section, shall disclose the same shall be guilty of a Class B misdemeanor; and shall thereafter be disqualified from holding any appointment or employment by the State . . ."

STATEMENT OF THE CASE

The statement of the case as set forth by Petitioners in their Petition is substantially correct. However, in discussing the unemployment compensation hearing and decision regarding these Respondents' claims for unemployment compensation benefits, they have neglected to state that there is nothing in the record of this case to support those assertions. The decision and transcript of the hearing of the unemployment compensation proceeding were never presented to the District Court in this case, and therefore were never considered by the District Court in passing upon this matter. Petitioners requested the Court of Appeals to take judicial notice of those proceedings, by way of supplementing the record on appeal. However, as set forth in the Court of Appeals' decision, that Court declined to do so, and specifically refused to consider "the impact, if any, of the unemployment compensation hearings and the findings which resulted." It is therefore clear that those matters may not be considered in support of this Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW IS IN CONFLICT WITH NO DECISION OF THIS COURT.

Contrary to the Petitioners' assertions, this Court has never held that a State official is immune from suit under 42 U.S.C. §1983 for violation of a state employee's rights to due process of law. On the contrary, this Court's decisions have been specifically to the contrary.

The decision in *Barr* v. *Matteo,* 360 U.S. 564 (1959), dealt solely with a suit for defamation. Nothing concerning a cause of action under 42 U.S.C. §1983 was mentioned in that case. Nor could it have been so mentioned, since this Court's decision in *Monroe* v. *Pape,* 365 U.S. 167 (1961), which gave life to 42 U.S.C. §1983 had not yet been decided. The Court of Appeals, as is clear from its decision, followed this Court's decision in *Barr* in affirming the decision of the District Court dismissing the libel counts against Petitioner Walker in this case.

As noted by this Court in *Paul* v. *Davis,* 424 U.S. 693, 96 S.Ct. 1155 (1976), different considerations are present in suits under 42 U.S.C. §1983 than in a suit brought claiming defamation and nothing more. This Court made it clear in that case that a government official who both defames an individual and at the same time deprives him of some right previously held under state law is amenable to suit. The Court started with the language in *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971):

> "While a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

This Court then interpreted that language in this manner:

> "We think that the italicized language in the last sentence quoted, 'because of what the government is doing to him,' referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry. 'Posting,' therefore, significantly altered his status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards. The 'stigma' resulting from the defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau of any 'liberty' protected by the procedural guarantees of the Fourteenth Amendment."

The Court then specifically referred to and reaffirmed its holding in *Board of Regents* v. *Roth,* 408 U.S. 564, 92 S.Ct. 2701 (1972), where specific reference was made to a dichotomy between a defamation, standing alone, and a defamation coupled with other action, such as the refusal to rehire or declination to re-employ.

Clearly, *Paul* v. *Davis* stands for the proposition that a defamation by a public official such as a Governor, standing alone, will not give rise to a constitutional violation where no prior hearing has been held, but that where there is action taken in connection with the defamatory statements which alters the individual's status, such a constitutional violation does exist. Clearly the defamatory accusations made against the Plaintiffs-Respondents here not only serve to defame them, but in the words of

this Court in *Roth* "imposed upon [them] a stigma or other disability that foreclosed [their] freedom to take advantage of other employment opportunities." 408 U.S. at 573. To hold otherwise would require a complete overruling of *Roth*.

Nor does anything contained in this Court's recent decision in *Bishop* v. *Wood*, ... U.S. ....., 96 S.Ct. 2074 (1976) lend any credence to Petitioners' argument. The decision that no liberty interest of that Plaintiff had been impinged upon was specifically based upon the fact that there was no dissemination or publication of the reasons for his dismissal:

> "In this case the asserted reasons for the City Manager's decision were communicated orally to the petitioner in private and also were stated in writing in answer to interrogatories after this litigation commenced. Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honesty, or integrity' was thereby impaired. And since the latter communication was made in the course of a judicial proceeding which did not commence until after petitioner had suffered the injury for which he seeks redress, it surely cannot provide retroactive support for his claim. A contrary evaluation of either explanation would penalize forthright and truthful communication between employer and employee in the former instance, and between litigants in the latter."

As recognized by the Court of Appeals, however, Governor Walker was not so circumspect. Rather, in what can only be termed the rashest of actions, he suddenly and without warning issued press releases to the news media at large scandalously attacking these Plaintiffs, with no hearing or opportunity whatsoever for them to respond to these charges. If such a series of actions does not constitute a violation of a liberty interest, no course of action

does. The complaint here clearly states a valid cause of action under the clear decisions of this Court. The Court of Appeals' decision to this effect is correct without question.

II.

PETITIONERS CANNOT CONTEND THAT PLAINTIFFS WERE GIVEN A DUE PROCESS HEARING.

The contentions of Petitioners that Plaintiffs-Respondents were granted a valid due process hearing via a post-termination hearing on claims which they had filed for unemployment compensation can only be termed absurd. This issue was never presented to the District Court, which ruled on the motions to dismiss with no affirmative material before it other than the motions to dismiss. Petitioners were denied leave to file the documents which show such alleged determination in the Court of Appeals, and the Court of Appeals refused to take judicial notice of that decision. Certainly the issues sought to be raised by Petitioners on this ground are not properly a part of the record of this proceeding, or properly before this Court.

In addition, the statutes of the state of Illinois clearly state that any information presented in such a hearing is to be confidential and shall not be published "nor be used in any court in any action or proceeding pending therein, not be used in any court in any action or proceeding other than one arising out of the provisions of this Act." Ch. 48, Ill. Rev. Stats., §640. Thus, by the laws of the State of Illinois, nothing having to do with this decision of the unemployment compensation system of Illinois may be used in this proceeding.

Lastly, and most obviously, such a hearing cannot pass for a due process hearing in connection with the Governor's

vicious attack upon these individuals. In order for a hearing such as that contemplated by the Constitution, it must have some capacity for righting the wrong. Such a hearing, whether held before or after their discharge, could have no effect whatsoever upon their positions of employment with the State, or whether statements pertaining to the reasons for their discharge would be made. The question in such a hearing is not whether a discharge should occur, or whether there was sufficient reason for terminating their employment. It is a wholly specialized and collateral proceeding which can affect only one area and one area alone —entitlement to unemployment compensation benefits. It is wholly separate and apart from the Governor's office, and the Plaintiffs-Respondents' position.

This hearing can give this Court no reason to decide the issues in this case, which have been decided before, and which were determined correctly by the Court of Appeals.

III.

THIS CASE RAISES NO NOVEL QUESTIONS UNDER EITHER THE FIRST OR FOURTEENTH AMENDMENTS.

Petitioners' arguments that this case raises novel questions under the First and Fourteenth Amendments is wholly without foundation. Any alleged claim of immunity of Petitioner Walker by virtue of his position as Governor of the State of Illinois from compliance with the Constitution of the United States has been decided adversely by this Court recently in *Scheuer* v. *Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 1687 (1974), where this Court reaffirmed its holding in *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, that whenever a state officer acts in a manner which violates the Federal Constitution, he

> "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

The gist of this action is for the deprivation of the rights of these Plaintiffs-Respondents in interfering with their liberty interests without due process of law—actions which could only have been done by Petitioner Walker because of his elected position. It is by virtue of this position that he has been able to violate their rights, and thus has clashed with the dictates of the Constitution. He cannot use that very status which subjects him to liability to claim immunity for his actions.

The fact that Plaintiffs-Respondents have requested injunctive relief (reinstatement until such time as they have been given that due process to which they are entitled) in addition to monetary damages adds no significant dimension to this case at the present time. All that has been held by the Court of Appeals is that the Complaint states a cause of action in certain respects. Whether the District Court on remand will ever hold that injunctive relief is available or appropriate in this case is conjectural at this point. The proper and appropriate remedy available must await a further explication of the facts. The Court of Appeals has not ruled upon the propriety of such remedy.

The argument now raised by Petitioners that at some unspecified time in the future some injunctive relief may be ordered is not ripe for adjudication by this Court. It is an argument not raised in either the District Court or the Court of Appeals. There is nothing in this record which

supports Petitioners' dire prophecies of federal court intervention into State personnel decisions. It is a "bogey man" of their own invention, not yet present in this case.

The Seventh Circuit has not imposed any requirement upon the State of Illinois, or its officials which has not previously been imposed by the decisions of this Court. Petitioner's cry that they have been and will be hindered in their decision making is the same bleat heard from every despotic bureaucrat who opposes any restraint upon his unbridled ability to act with impunity.

Illinois, along with many other states, has done away with sovereign immunity. Illinois Constitution, Article VIII, §4. There is no longer any king, and every public official is responsible for his actions which tread upon the constitutional rights of others. When such a public official deprives a state employee of his livelihood and at the same time takes steps to insure that such employee will never be able to obtain other employment, by castigating him without granting that employee even a modicum of an opportunity to be heard, he cannot claim that he is acting as a responsive or responsible public official. Rather, he is trampling upon the rights of all of us. A Governor cannot claim that he is helping the public at large reach an informed opinion on matters of which he himself is not informed. What Petitioners ask is a right to do what they will to make it appear to the public that they are acting in a forthright and responsible manner while they are in reality trampling upon our most precious commodity—due process of law. This Court has reaffirmed time and time again that such actions will not be tolerated. There is no need that it do so again.

CONCLUSION

For the foregoing reasons, Respondents Samuel Indovina and Samuel Colaizzi respectfully pray that this Court deny the Petition for Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

WAYNE B. GIAMPIETRO
PHILLIP E. FREED

Attorneys for Respondents
Samuel Colaizzi
and Samuel Indovina

WAYNE B. GIAMPIETRO
134 N. LaSalle Street
Chicago, Illinois 60602

PHILLIP E. FREED
188 W. Randolph Street
Chicago, Illinois 60601

February 24, 1977